In the District Court of the United States for the Southern District of New York

CIVIL No. 26–508

ADIRONDACK TRANSIT LINES, INC.,
PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final judgment,[1] dated November 3, 1944, of a specially constituted district court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing plaintiff's complaint to set aside an order of the Interstate Commerce Commission. The Commission's report and order, dated June 6, 1944, required plaintiff to desist and abstain from certain motor-bus operations found by the Commission to be unlawful, unless and

[1] The Court also on October 16, 1944, rendered a *per curiam* opinion and made findings of fact and conclusions of law.

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until plaintiff shall have received an appropriate certificate of public convenience and necessity authorizing such operations. The operations thus prohibited consisted of transportation between Weehawken, New Jersey, and New York City through the Lincoln Tunnel instead of by ferry. An appeal was allowed on December 2, 1944, and appellees were served with the appeal papers on December 8, 1944.

There is no controversy as to the facts. The Commission's report and order were entered on the complaint of certain bus lines, intervening defendants here, which are engaged in short-haul mass transportation between New York City and urban territory in New Jersey. In this complaint they charged that plaintiff was engaging in certain transportation not authorized under a certificate of public convenience and necessity, which it held, and prayed that plaintiff be ordered to discontinue such operations. From the Commission's report of June 6, 1944, it appears that plaintiff holds a certificate, issued by the Commission on June 4, 1937, under the "grandfather clause" of Section 206 of the Interstate Commerce Act (49 U. S. C. 306), authorizing, *inter alia,* service between Saranac Lake, New York, and New York City over certain highways specifield, and "thence over * * * unnumbered roads to Weehawken, N. J., and thence across the Hudson River to New York, and return over

the same route." This certificate became effective on July 5, 1937. On or about December 22, 1937, the Lincoln Tunnel was opened to traffic. It passes under the Hudson River, connecting Weehawken and New York. Plaintiff immediately began to operate through the Tunnel instead of using the ferry, which it had formerly employed between Weehawken and New York. Plaintiff's new method of operation resulted in cessation of operations not only over the ferry, but also over Pershing Road, which leads to the ferry in Weehawken, and the inauguration of operations in Weehawken over that portion of Boulevard East extending south from its intersection with Pershing Road to the Tunnel entrance, serving intermediate points through the Tunnel to New York. From an earlier report of Division 5 of the Commission in this same case (42 M. C. C. 123) it appears that on December 23, 1937, plaintiff filed a change-of-route application [2] in which it sought the right to use the Tunnel rather than the ferry,

[2] This application and the Commission's general order of May 17, 1937, under which it was filed, are both attached as exhibits to the complaint. As indicated by this order, such applications were to be used only where the proposed change did not involve any substantial change in service between the terminal points or to and from intermediate and off-route points, and where there was no question of public convenience and necessity under Section 207 presented. This procedure was designed to permit such minor changes without a formal hearing and without compliance with Section 207, which ordinarily forbids the institution of new operations without proof that they are required by the public convenience and necessity.

and that no action was ever taken by the Commission on this application.

The Commission decided that plaintiff's certificate did not authorize operation through the Tunnel and that the new method of operation was therefore unlawful. The basis of its decision is indicated in the following excerpt from its report:

> With respect to operation through the Tunnel, defendant contends, on reply, that while we could not certify that public convience and necessity required operation through a nonexistent facility, we could and did grant to defendant, by the use of the term: "* * * and thence across the Hudson River * * *", a sufficiently broad authority to permit the defendant to change its route and make use of such new facility, if, as, and when the same became available.
>
> Obviously this contention is untenable. The "grandfather" clause of section 206 (a) of the act contemplates only the authorization of such bona fide operations as were engaged in on June 1, 1935, and continuously since, over the route or routes (insofar as is here pertinent) for which application is made. Whatever the intention may have been in incorporating the previously described description in defendant's "grandfather" certificate, plainly such certificate cannot be construed to authorize an operation which was not being conducted at the time the certificate was issued, and could not have been conducted at that time

or prior thereto. It will be noted, moreover, that the authority set forth in defendant's certificate is predicated upon the finding in the initial paragraph thereof—"* * *; that the said applicant was in bona fide operation over said routes on June 1, 1935, and has so operated since * * *."

We conclude that the term "unnumbered roads to Weehawken" in defendant's certificate, should be construed to mean the roads, highways, and streets over which defendant was operating on the statutory date and continuously thereafter until the effective date of its certificate, and that the above-described departure from such routes, including service at intermediate points between Pershing Road and the Tunnel entrance, subsequent to the effective date of its certificate is unauthorized thereunder. We further conclude that the term "thence across the Hudson River to New York", in defendant's certificate, refers to the method of crossing employed by it on the statutory date and on the effective date of its certificate in No. MC–2835, namely, the ferry, and does not authorize operation through the Lincoln Tunnel.

The Commission's decision was, however made—

* * * without prejudice to the filing of an application by defendant, under section 207 of the act, seeking authority to operate through the Lincoln Tunnel, or seeking temporary authority, under section 210 (a) of the act, as amended by the Sec-

ond War Powers Act, 1942, for such operation during the pendency of such application filed under section 207.[3]

The District Court, in its *per curiam* opinion, concluded that plaintiff's certificate was ambiguous, that its construction was for the Commission, and that the courts could not disturb such an interpretation unless it was clearly arbitrary or erroneous, which was found not to be the case here. It further concluded that even if it were free to interpret the certificate *de novo,* it would independently have reached the same result as did the Commission.

As appears from its jurisdictional statement, plaintiff attacks the court's decree and the Commission's action primarily on the following three grounds: (1) That the Commission's action amounts to a partial revocation, suspension, or change of plaintiff's certificate in violation of and without compliance with Section 212 of the Interstate Commerce Act (49 U. S. C. 312); (2) that plaintiff's certificate did convey the right to operate through the Tunnel; and (3) that plaintiff

[3] Plaintiff accordingly has since filed with the Commission an application under Section 207, requiring proof of public convenience and necessity for permanent authority to conduct operations through the Tunnel (Docket No. MC–2835, Sub. 10) and also an application for temporary authority to use the Tunnel (Docket No. MC–2835, Sub. 11 W). Under the latter application temporary authority to use the Tunnel was granted to plaintiff on August 1, 1944, and pursuant thereto it is presently operating in that fashion.

in any event received such right because of the Commission's acts in respect to its change-of-route application of December 23, 1937. It is submitted that these contentions present no substantial question and that the decree of the District Court should therefore be affirmed without argument.

(1) The present proceeding was not one to suspend, change, or revoke a certificate, as contemplated by Section 212 of the Act. That section provides for the amendment or revocation of a certificate by the Commission upon application by the holder, or upon complaint or the Commission's own initiative, after notice and hearing, for failure to comply with the Act, the Commission's lawful orders or regulations issued thereunder, or any term of the certificate. Here instead the question is one of construing an existing certificate, which does not specifically mention operations via the Tunnel to determine whether such certificate nevertheless, actually contemplated and authorized such operations. The Commission clearly has power to construe its orders. Thus the Supreme Court has held that the Commision possesses authority to construe its general accounting regulations and to apply them to particular situations.[4] Likewise in cases involving

[4] *Kansas City Southern Ry. Co.* v. *United States*, 231 U. S. 423; *Norfolk & Western Ry. Co.* v. *United States*, 287 U. S. 134, 140; See also *Chesapeake & Ohio Ry. Co.* v. *United States*, 5 F. Supp. 7, 14.

rate orders of the Commission the court has made it plain that if an order is indefinite or ambiguous application should be made to the Commission for interpretation and clarification.[5]

2. Both the Commission and the District Court have held, contrary to plaintiff's contentions, that plaintiff's certificate did not convey the right to operate via the Tunnel. The court, while indicating that it would have reached this result independently, nevertheless, concluded that the Commission's construction of its own certificate was binding upon it unless it was clearly erroneous or arbitrary. Plainly the court was correct in thus ascribing much weight to the Commission's interpretation. It is well settled that the court which issues a mandate is normally the best judge of its content on the general theory that the author of a document is ordinarily the authoritative interpreter of its purposes. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 141. No reason appears why this should not be equally true of a construction of its mandate by the Commission, especially in view of the great weight attached to its interpreta-

[5] *American Express Co.* v. *Caldwell*, 244 U. S. 617, 627; *Georgia Commission* v. *United States*, 283 U. S. 765, 772; see also *American Tel. & Tel. Co.* v. *United States*, 299 U. S. 232, 242, 244–5; *Illinois Commerce Commission* v. *Thomson*, 318 U. S. 675.

tions of the statute which it administers [6] and to its expert determination under the "grandfather" clause as to the scope of past operation.[7] And see *Illinois Commerce Commission* v. *Thomson, supra,* 680–1, 685.

Likewise, the court was correct in concluding that the Commission's interpretation of its certificate was not clearly erroneous or arbitrary. The Commission's construction of the certificate as limiting plaintiff to use of the ferry route actually employed by it during the "grandfather" period, was the only possible one in the light of its powers under the "grandfather" clause, and the general purpose of that clause. The Commission is empowered to issue a certificate under that clause to a carrier only if "any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time." Since the plaintiff did not and could not operate via the Tunnel route during the "grandfather" period, the Commission was not authorized under the "grandfather" clause to permit plaintiff to operate over that route. As has frequently been reiterated,

[6] *United States* v. *American Trucking Association,* 310 U. S. 534, 544.

[7] *United States* v. *Carolina Carriers Corporation,* 315 U. S. 475, 482–483.

that clause contemplates substantial parity between future operations and prior bona fide operations. *Alton Railroad Co.* v. *United States,* 315 U. S. 15, 22; *United States* v. *Carolina Freight Carriers Corp., supra,* 481; *Noble* v. *United States* 319 U. S. 88, 92; *Crescent Express Lines* v. *United States,* 320 U. S. 401, 409. Accordingly, the Supreme Court has consistently upheld restrictions imposed by the Commission upon carriers wherein it has sought to limit them with great precision to the exact type of service performed during the "grandfather" period. *United States* v. *Maher,* 307 U. S. 148; *Noble* v. *United States, supra; Crescent Express Lines* v. *United States, supra.*

This construction is also perfectly consistent with the terms of the language employed in the certificate. The Commission concluded that the phrases "unnumbered roads to Weehawken" and "thence across the Hudson River to New York" had reference not to any irregular route or territorial operation, but instead to the regular routes employed, and the method of crossing the river used by plaintiff during the "grandfather" period. This construction plausibly follows from the Commission's statements that its consistent practice has been to refuse to authorize passenger operations except over regular routes,* and that

* The statute in fact requires the Commission in certificates issued under Section 207 to limit the activities of passenger carriers to regular route operations between fixed termini.

the above authority was predicated upon the finding in the initial paragraph of the certificate "that the said applicant was in bona fide operations over said routes on June 1, 1935, and has so operated since." It is significant, too, as the District Court observed, that the certificate did not authorize transportation under but merely "across" the river. Furthermore, the Commission's construction of this certificate is consistent with its conclusions in other cases, one of them relating to certain of the intervening defendants, that where carriers, pursuant to pending "grandfather" clause applications, had been using the Weehawken ferry or the Holland Tunnel, they could not secure the right to change to the Lincoln Tunnel without proof that the public convenience and necessity required such operations. *Lincoln Tunnel Applications,* 12 M. C. C. 184, 195; *Pennsylvania Greyhound Lines, Inc., Lincoln Tunnel Route,* 30 M. C. C. 373.

3. Clearly, too, as the District Court held, the Commission's action with respect to plaintiff's change of route application of December 23, 1937, conveyed no rights to use the Tunnel. It is undisputed that the Commission took no action with respect to this application, and, as the court properly held, such inaction was not the equivalent of a favorable decision upon the application. *Union Stock Yard Co.* v. *United States,* 308 U. S. 213, 224.

For the foregoing reasons it is respectfully submitted that the judgment of the District Court should be affirmed.

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